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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 166

SAMUEL D. CATES, TRADING AS GLORY BEE PRODUCTS AND GLORY BEE,

Petitioner,

vs.

JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

FRANK E. GETTLEMAN,
ARTHUR GETTLEMAN,
EDWARD BRODKEY,
Counsel for Petitioner.

June 29, 1951.

THE BLAKELY-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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JOHN HADERLEIN, AS POSTMASTER OF THE CITY OF CHICAGO, IN THE COUNTY OF COOK AND STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

Petitioner, Samuel D. Cates, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case entered on May 23, 1951 affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, dated October 27, 1950.

OPINIONS BELOW.

The findings of fact, conclusions of law, memorandum opinion and Order of the District Court (R. 100-101) are unreported. The opinion of the Court of Appeals for the Seventh Circuit (R. 119) is not yet reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the Postmaster General and the Post Office Department, in their conduct of hearings under Sections 259 and 732 of Title 39 United States Code, after the effective date of the Administrative Procedure Act of 1946, *5 U. S. C. 1001, et seq.*, were required to subject themselves to the provisions and requirements of said Administrative Procedure Act and to grant a fair hearing as required by Section 5(c) of that Act if their resulting orders were to have validity.

STATUTES INVOLVED.

The relevant portions of the Statutes applicable to the question herein presented follow:

Section 5 of the Administrative Procedure Act of 1946, *5 U. S. C. 1001, et seq.*, provides in part:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *
>
> * * * * * *
>
> "(c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision * * * no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any

agency. No officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *."

Section 259 of Title 39 U. S. C. provides in part:

"The Postmaster General may, upon evidence satisfactory to him * * * that any person or company is conducting any * * * scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company * * * to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. * * *"

Similarly, *Section 732 of Title 39 U. S. C.* provides in part:

"The Postmaster General may, upon evidence satisfactory to him that * * * any person or company is conducting any * * * scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order * * * and may provide by regulation for the return to the remitters of the sums named in such money orders."

Public Law 843, 81st Congress, second Session, effective only on and after September 27, 1950, provides:

"Proceedings under law relating to the exclusion

or expulsion of aliens shall *hereafter* be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act." (Emphasis supplied.)

STATEMENT.

This is a proceeding by which the Petitioner herein seeks an injunction against John Haderlein, as Postmaster of the City of Chicago, Illinois, to restrain him from carrying out the terms of a Fraud Order issued by the Postmaster General on August 16, 1950. The fraud order was issued after a hearing before a Trial Examiner of the Post Office Department. This hearing was not conducted in accordance with the requirements of the Administrative Procedure Act of 1946, to the provisions of which the Postmaster General does not believe himself or his Department subject.

1. In the administrative complaint to the Solicitor of the Post Office Department, dated March 6, 1950, it was charged that Petitioner herein was conducting a scheme for obtaining money through the mails by means of pretenses knowingly false or fraudulent in violation of the Statute (Sections 259 and 732 U. S. C.) in making certain advertising representations in his sale of incense products through the mails. Petitioner's answer thereto admitted his dissemination of the circular matter in question through the mails but denied the import of those advertisements as they were characterized by the Postmaster General and denied that he had made any false or fraudulent representations or promises in violation of the Statute.

2. Issue being so joined, a hearing was had in said proceeding before a Trial Examiner of the Post Office Department on March 22, 1950. At this hearing, the government offered the testimony of a post office inspector

and a medical officer of the Federal Food and Drug Administration. Petitioner herein did not offer any evidence.

3. Thereafter, on August 14, 1950, the Trial Examiner filed his Findings of Fact and Recommendation, which were approved by the Solicitor of the Post Office Department and formed the basis for the fraud order of the Postmaster General. The Trial Examiner categorically rejected Petitioner's contention that he was selling his incense for what it was, without lying about it, and found that by the tenor and effect of his advertising Petitioner was vouching for the truth of the old and respectable superstition that incense might bring its users good luck.

4. Petitioner filed his complaint for injunction in the District Court on August 30, 1950. He charged that the findings of the Trial Examiner of the Post Office Department and the Fraud Order of the Postmaster General based thereon found no support in substantial evidence but were manifestly against its weight, and that the entire administrative proceeding and resulting fraud order were void for failure of the Postmaster General before that time to comply with the requirements of the Administrative Procedure Act of 1946 and to grant Petitioner the fair hearing prescribed by that Act, including *inter alia*, but without limitation, a complete separation of the investigative and prosecutory from the adjudicative functions on hearing within the agency. Respondent herein filed his answer in the District Court and the matter was argued orally before the District Judge both on Petitioner's motion for preliminary injunction and temporary restraining order and on his motion for permanent injunction.

5. On October 27, 1950, the District Court entered its

Order finding that there was sufficient substantial evidence produced by the Post Office Department at its hearing to support the issuance of the fraud order by the Postmaster General and that proceedings by the Postmaster General under Sections 259 and 732 of Title 39 U. S. C. are not within the provisions of the Administrative Procedure Act. It accordingly denied Petitioner's prayer for injunction and dismissed his complaint.

6. On appeal to the United States Court of Appeals for the Seventh Circuit, this Petitioner urged that the District Court had erred (R. 105) in so finding that the Administrative Procedure Act of 1946 and particularly but without limitation Sections 2, 5, 7, 8 and 11 thereof were inapplicable to the conduct of proceedings by the Postmaster General for the issuance of a "fraud order" under Title 39 U. S. C., Sections 259 and 732; and further, that the District Court erred in its failure to find that such proceedings by the Postmaster General are required to be conducted in accordance with the provisions of said Administrative Procedure Act and if such be not done, the said proceedings, including any findings or order resulting therefrom are void and of no force and effect.

7. The United States Court of Appeals affirmed the judgment of the District Court on May 23, 1951, saying that:

> "The terms of the statutes under which the Fraud Order here under consideration was issued, make no provision for a hearing in connection with the issuance of fraud orders, but provide, 'The Postmaster General may, upon evidence satisfactory to him,' issue such orders. * * * the constitutionality of the sections authorizing their issuance was upheld * * *" and
>
> "We think that by its very terms the Administrative Procedure Act, applying as it does to cases 'of adjudication required by statute to be determined on the record after opportunity for an agency hearing,' is

inapplicable to a mail fraud order issued under 39 U. S. C., Secs. 259 and 732, *since those statutes contain no requirement for hearing* or opportunity therefor." (Emphasis supplied.)

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the Seventh Circuit erred:

(1) In holding that the Administrative Procedure Act of 1946 was inapplicable to a mail fraud order issued under 39 U. S. C., Secs. 259 and 732.

(2) In failing to hold that the Administrative Procedure Act of 1946 was applicable to all hearings held pursuant to 39 U. S. C., Secs. 259 and 732 and that in the absence of compliance with the terms of said Administrative Procedure Act in the conduct of hearings under 39 U. S. C., Secs. 259 and 732, the resulting findings and Fraud Order were void.

(3) In affirming the Order and Judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

1. Importance of the Question Presented.

The instant case presents a question of the utmost importance in the interpretation of a major federal procedural statute, the Administrative Procedure Act of 1946. One of the principal purposes of this Act was to insure a fair hearing to those persons having business with the many federal agencies. The Court of Appeals for the Seventh Circuit has decided that the requirements of fairness imposed by that Act are not applicable to proceedings of the Post Office Department leading to the issuance of Fraud Orders. In view of the fact that this Court has already

decided that that Act is applicable to the proceedings of other Federal Departments and agencies, *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), *Riss and Company, Inc.* v. *United States and Interstate Commerce Commission*, 341 U. S. 907, 71 S. Ct. 620 (1951), it seems desirable that the question of its applicability to proceedings by the Postmaster General should likewise be settled by this Court. Petitioner believes the Court of Appeals has herein decided this federal question in a way probably in conflict with applicable decisions of this Court. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

2. The Applicability of Section 5 of the Administrative Procedure Act is Not Limited to Cases Where a Statute in Terms Requires a Hearing. It Extends to Cases Where a Hearing is Required by Judicial Construction.

The Court of Appeals decided that the Administrative Procedure Act did not require observance of its procedural safeguards when the Postmaster General should conduct hearings under the mail fraud statutes; that the provisions of that Act for independence of the Trial Examiner, in his tenure and control, and for separation of functions within the agency, had no application to the proceedings of this particular Department. It based that decision on the fact that Sec. 5(c) of the Administrative Procedure Act states that it is applicable

> "In every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing, * * *." (Italics ours.)

And the Court of Appeals points out that there is no requirement for such a hearing *expressly* set out in either Section 259 or 732 of the postal laws, both of which specify that the Postmaster General may issue a Fraud Order "upon evidence satisfactory to him."

The necessity of an express requirement for hearing in the applicable statute before the Administrative Procedure Act should apply was urged by the United States Immigration Service and rejected by this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950). This Court there said:

"* * * The Government contends that there is no express requirement for any hearing or adjudication in the Statute authorizing deportation, and that this omission shields these proceedings from the impact of Section 5. Petitioner, on the other hand, contends that deportation hearings, though not expressly required by Statute, are required under the decisions of this Court, and the proceedings, therefore, are within the scope of Section 5.

* * * * *

"We think that the limitation to hearings 'required by Statute' in Section 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the Statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one created by it as a matter of expediency.

* * * * *

"We find no basis in the purposes, history or text of the Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act *if resulting orders are to have validity.*" (Italics ours.)

And this Court recently came to the same conclusion with respect to the proceedings of the Interstate Commerce Commission in *Riss and Company, Inc.* v. *United States and Interstate Commerce Commission*, 341 U. S. 907, 71 S. Ct. 620 (1951).

It is noteworthy that the Court of Appeals of the Seventh Circuit was also guided in its decision by the previous decision in *Bersoff* v. *Donaldson*, DC Cir., 174 F. 2d 494, 495 (1949), wherein that Court, in the District of Columbia Circuit, erroneously held:

> "The fraud order statutes do not *in terms* require a hearing. Therefore, we think, they do not come within the scope of the procedural provisions of the Administrative Procedure Act." (Emphasis supplied.)

Such decision was, of course, prior to the decision in the *Sung* case, *supra*, in which this Court rejected the proposed requirement that express provision for hearing be contained within the language of the statute.

3. The Mail Fraud Statute Requires a Hearing Before the Post Office Department.

Assuming then that Section 5 of the Administrative Procedure Act is applicable not only where the statute in terms requires a hearing but also where the statute must be construed to require a hearing in order to satisfy constitutional limitations, the next question is whether the fraud order statute must be so construed. It is submitted that in order to satisfy the guaranties of due process the statute must be construed as requiring a hearing before the agency.

The Court of Appeals herein was persuaded that:

> "• • • the Administrative Procedure Act (is) inapplicable to the Fraud Order in question because, first, no hearing is required under 39 U. S. C., Secs. 259 and

732, and, second, these statutes are constitutionally valid without any hearing requirement having been read into them."

In support of the proposition that no hearing is required by judicial construction as a prerequisite to the issuance of a fraud order under the statutes noted, the Court of Appeals relied on *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904), which was a "seizure" case wherein there was a full hearing on the merits before a Master in Chancery after the fraud order had been issued by the Postmaster General. In holding the applicable statutes constitutional without the express requirement of a prior hearing, this Court predicated its decision upon (1) the fact that the Post Office was a dispenser of privileges, so that there might be no deprivation of property without due process of law, and (2) that there was adequate opportunity for judicial review.

On the other hand, we must note that in the recent case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), this Court did not hesitate to hold that a hearing was required under the Administrative Procedure Act in connection with deportation proceedings of the Immigration Service, an agency which, like the Post Office Department, claimed that it was a dispenser of privileges only and on that account exempt from the requirement of granting a hearing.

One could reasonably argue that the language of the statute which permits the Postmaster General to issue a fraud order "*on evidence satisfactory to him*" (emphasis supplied) presupposes that a hearing be held wherein some evidence could be adduced. But this Court in *Reilly* v. *Pinkus*, 338 U. S. 269 (1950), has saved us that trouble and speculation. In that case, which was also a suit to enjoin a Postmaster from enforcing a fraud order, after agency hearing, this Court affirmed the decision of the District Court in granting the injunction for the reason that the

respondent in the administrative proceeding had been restricted in his opportunity to cross-examine. This Court, speaking through Mr. Justice Black said:

> "Second. Nevertheless, we are constrained to hold that the present fraud order should not be enforced. It has been pointed out that the doctors' expert evidence rested on their general professional knowledge. To some extent this knowledge was acquired from medical text books and publications, on which these experts placed reliance. In cross-examination respondent sought to question these witnesses concerning statements in other medical books some of which at least were shown to be respectable authorities. The questions were not permitted. We think this was an undue restriction on the right to cross-examination."

Certainly, if this Honorable Court adheres to a requirement for adequate opportunity for cross-examination in order to assure that there will be no deprivation of due process of law, and so holds in a Post Office fraud case like the one at bar, it would seem necessarily to follow that there must be such a hearing, in the first instance, as a matter of law, or far more injury will be done than by a simple denial of the right to cross-examine. To dispense with the requirement for a hearing in such case would be to dispense with *all* opportunity for cross-examination and to deprive us of what Professor Wigmore regards as our greatest procedural guarantee of trustworthiness.

There has not been any occasion to present squarely for judicial decision the question whether a fraud order could be entered without a hearing because the traditional practice of the Post Office Department is to grant a hearing. The *ratio decidendi* of most of the cases involving fraud orders has been that after analysis of the evidence presented at the hearing the court concludes that the order of the Postmaster General either was or was not within his statutory power. The question of the adequacy of the

hearing, when it has arisen at all, has been decided in favor of the hearing. But it is quite clear that all of the decisions assume, where they do not actually say so, that a hearing with a record is contemplated by the statute.

The Post Office Department has taken the position administratively that the statute does not require a hearing, but that as an act of administrative grace one is always given and that the customary hearing accords fully with the concept of "fair play."[1]

On the record of such a hearing many orders have been reviewed by the courts in suits to enjoin the enforcement of the orders. No attempt will be made to discuss all of the cases, but enough of them will be cited to demonstrate that they either refer to the necessity of hearing or presuppose such necessity. It is believed that they point to the necessary conclusion that a hearing on the record is a statutory and constitutional requirement.

It is sometimes argued that there is no constitutional right to have one's mail carried by the government, hence procedural due process is not a requirement for revocation of mailing privileges. As will presently appear, the courts today are not taking this narrow view, even though it may have been suggested by some of the earlier decisions. The 1904 case of *Public Clearing House* v. *Coyne*, 194 U. S. 497 (1904), said that the power vested in Congress by the Constitution to establish a postal system is permissive and that, therefore, Congress had the right to designate what may be carried in the mails and what may be excluded. The constitutionality of the fraud order provision was upheld. But this Court recognized that even Congress was without power to extend the benefits of postal service to one class of persons and deny them to another of the same class. The Court

1. See speech of Frank J. Delany, Solicitor, Post Office Department, at Institute conducted by New York University School of Law, February 1-8, 1947 (published by New York University School of Law in Proceedings of the Institute at pp. 196-206).

did say that the postal service is by no means an indispensable adjunct to a civil government in the same sense that the protection of life, liberty and property is a governmental function. But certainly, in the light of later cases, this is not to be construed to mean that the power to use the mails can arbitrarily be granted or withheld.

In *Burton* v. *United States*, 202 U. S. 344 (1906), this Court declared that the authority of the Post Office Department in the protection of the mail "has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; *such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.*" (Emphasis supplied.) And Mr. Justice Brandeis, in a dissenting opinion in *United States, ex rel., Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, 430 (1921), emphasized that the power of Congress over the postal system "like all its other powers is subject to the limitations of the Bill of Rights."

Certainly the view of the function of the Post Office Department which presently prevails is that stated by Chief Justice Groner of the United States Court of Appeals for the District of Columbia in *Pike* v. *Walker*, 73 App. D. C. 289, 121 F. 2d 37 (1941), *cert. den.* 314 U. S. 625, *rehearing denied* 314 U. S. 710, in the following language (at p. 39):

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post

Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution, and if they have, it would follow that in administering the laws established to protect the mail and the regulations thereunder the duty of the Postmaster General would be,—to use the language of Justice Brandeis in the *Burleson* case, *supra*,—that:

> " 'In making the determination he must, like a court or a jury, form a judgment whether certain conditions prescribed by Congress exist, on controverted facts or by applying the law. The function is a strictly judicial one, although exercised in administering an executive office. And it is not a function which either involves or permits the exercise of discretionary power' * * *

which is to say, that his authority is governed by the Acts of Congress which confer it, and by the law of the land."

Pike v. *Walker* involved a fraud order and it is one of the most significant of the recent cases. There this Court in effect rejected the contention of the government that no individual has a natural or constitutional right to have his communications delivered by the postal establishment and, hence, that a fraud order may be issued summarily and without any notice or any hearing. In stating the government's argument, the Court of Appeals said that the Postmaster General "insists that since no hearing is required, the courts are without power or authority to consider whether an adequate hearing was accorded." Disagreeing with this contention the Court said that "the proposition urged by the Postmaster General and accepted by the Court below is too far reaching to be admitted until specifically recognized and declared by the Supreme Court." Certainly this opinion assumes that a hearing and other procedure conformable to due process is required by the statute.

It is interesting to note that the government has been

has frequently acted administratively to bar from the mails allegedly obscene matter, and it has been held that his action is not reviewable by the courts unless his judgment has been wholly arbitrary and without foundation. *Anderson* v. *Patten*, 247 Fed. 382 (D. C. S. D. N. Y., 1917). In *Walker* v. *Popenoe*, the Court squarely held that the order of the Postmaster General barring plaintiff's pamphlet from the mails as obscene, without a hearing, was invalid as a violation of due process. The requirement for notice and hearing was discussed at some length in a concurring opinion by Mr. Justice Arnold which the Court stated also represented the views of that Court.[3] It is interesting to note that, although the case arose under the statute barring obsence matter and did not involve a fraud order, Mr. Justice Arnold quoted from *Pike* v. *Walker* to support the proposition that due process of law requires a hearing as a prerequisite to action barring obscene matter from the mails.

In *Plapao Laboratories, Inc.* v. *Farley*, 92 F. 2d 228 (1937), *cert. den.* 302 U. S. 732, the Court of Appeals for

3. Mr. Justice Arnold stated in his opinion (at 149 F. 2d 513) that:

> The power to exclude a publication from the mails without a hearing in practical effect permits the Postmaster General to cause irreparable injury to any publisher without the minimum safeguard of an opportunity to present his case. There are, of course, other means of distribution besides the mails, but they are not effective ones in the case of ordinary publications. To deprive the publisher of the use of the mails is like preventing a seller of goods from using the principal highway which connects him with his market. In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process implicit in the Fifth Amendment.

Following the above quotation Mr. Justice Arnold quoted with approval the same language from *Pike* v. *Walker* which is set out verbatim, *supra*.

the District of Columbia had before it an appeal from a decree of the District Court dismissing a bill to restrain enforcement of a fraud order. It was contended, among other things, that the procedure of the Post Office Department did not comply with the requirements enunciated by this Court in *Morgan* v. *United States*, 298 U. S. 468 (1936). It appeared in the *Plapao* case that an assistant solicitor had presided at the hearing. He heard and considered the charges and received evidence which he analyzed and reported to the Acting Postmaster General. The report, being satisfactory to the Acting Postmaster General, was acted on by that officer who issued the fraud order that was challenged. The Court said:

> "Appellants confidently rely upon *Morgan* v. *United States*, 298 U. S. 468, 56 S. Ct. 906, 910, 80 L. Ed. 1288, seeking to enjoin the enforcement of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies for buying and selling livestock. 'The outstanding allegation' in that case '* * *' is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.' The mere statement of this allegation is sufficient to distinguish the Morgan case from the present appeal. In the present case the procedure was old, and the Acting Postmaster General considered the evidence. In the Morgan case the Court said: 'The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility'."

Thus, the Court distinguished the type of hearing given in the *Plapao* case from that condemned in the *Morgan* case, concluding that the Post Office hearing was not subject to the same infirmities as the hearing involved in the *Morgan* case. But underlying the *Plapao* opinion is the basic assumption that there must be a fair hearing.

It should be noted that in reviewing postal fraud orders the courts have applied the rule of review that the findings of the Postmaster General will be accorded great weight and that they will not be disturbed if there is substantial evidence to support them. This is the rule which, at least as a general proposition, applies where findings are entered after full hearing. Typical of the cases where this rule was followed in reviewing postal fraud orders is *Leach* v. *Carlile*, 258 U. S. 138 (1922), which involved an appeal from a Circuit Court of Appeals decision affirming a District Court decree dismissing a suit to enjoin enforcement of a fraud order. This Court said (at p. 139):

> "The order complained of was entered *after an elaborate hearing*, of which the appellant had due notice and at which he was represented by counsel, and introduced much evidence."

After referring to the facts the Court further said (at pp. 139-140):

> "This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts, *where it is fairly arrived at and has substantial evidence to support it*, so that it cannot justly be said to be palpably wrong and therefore arbitrary." (Emphasis supplied.)

The language just quoted has a familiar ring often heard in decisions upholding orders based on a record made at a full hearing.

See also *Donaldson* v. *Read Magazine*, 92 L. ed. 440 (1948). And in *Farley* v. *Simmons*, 99 F. 2d 343 (1938), *cert. denied* 305 U. S. 651, *rehearing denied* 305 U. S. 676, the Court of Appeals said (at p. 348):

> "We think it cannot be said that the evidence upon which rested the findings of the Postmaster General was so insubstantial as to render the findings arbitrary."

The Post Office Department's practice of issuing fraud orders only after hearing certainly must be counted as an important factor making for judicial acceptance of the record and findings. Surely, the cases make it clear that this judicial acceptance grows out of the assumption that a fair hearing has in fact been accorded.

Moreover, the necessities of judicial review require a hearing. If there has not been a hearing on a record, how can there be adequate judicial review of orders required to be based on evidence? It is not necessary, certainly, to discuss the due process requirement of judicial review. But for the purpose of this supporting brief it can be merely stated that where administrative orders vitally affect property interests there must be adequate judicial review. See: *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38 (1936).

Time and again, when discussing judicial review, courts have referred to the necessity of reviewing the record. Thus, in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80 (1943), this Court said (at p. 87):

> "The grounds upon which an administrative order must be judged are those grounds upon which the record discloses that its action was based."

Where statutes do not specifically provide for judicial review, the processes of equity are usually available for judicial review, as in the case of proceedings to enjoin postal fraud orders. Whether judicial review is specifically provided by statute or not, such review in the ordinary proceeding is only possible upon a record. Certainly no contention can be made at this late date that postal fraud orders are not judicially reviewable, in the light of the fact that the courts have repeatedly reviewed such orders in equity actions to enjoin. It follows that judicial review of such order is only possible upon a record made at an administrative hearing.

In view of the basic character of postal fraud orders, and their far-reaching effect on American business, it seems so clear as not to require argument that if Section 259 were construed not to require a hearing it would be unconstitutional, or, at the very least, there would be a serious doubt as to its constitutionality. It has been settled by many court decisions that when the constitutionality of a statute is in question, if the statute is reasonably susceptible of two constructions, by one of which it would be unconstitutional and by the other valid, it is the court's duty to adopt that construction which will save the statute from constitutional infirmity.

It is submitted that even though the procedure followed in particular cases may be fair, that fact does not in any way bear upon the construction that must be given the statute. The fraud order statute must, if possible, be construed so as to avoid constitutional doubt. It has already been shown that the courts have so construed it; they have in effect, where they have not in express terms, held that the statute requires a hearing.

Since postal fraud orders can only lawfully and constitutionally be entered on a record after opportunity for

an agency hearing, the procedure under the statute must be regarded as "adjudication required by statute to be determined on the record after opportunity for an agency hearing" within the meaning of Section 5 of the Administrative Procedure Act.

It seems patent, therefore, that the hearings of the Postmaster General, under Title 39 U. S. C. Sections 259 and 732, should be conducted fairly in accordance with the procedural safeguards of the Administrative Procedure Act, in like manner as those of the Commissioner of Immigration and the Interstate Commerce Commission, if they are to have validity.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

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